



Appeal of Telonic Altair, Inc.

The sole issue for our determination is whether appellant is **properly** subject to a late filing penalty.

Appellant's annual franchise tax return for the appeal year was due on March 15, 1975, pursuant to section 25401 of the 'Revenue and Taxation Code. On April 1, 1975, appellant mailed a request for an extension of time until June 15, 1975, to file this return, explaining that the data required for preparation could not be obtained in sufficient time to accomplish filing by the due date. This application was received on April 3, 1975. Respondent denied the request for an extension because it was not made until after the due date for filing the return. Appellant's return for the appeal year **was** received on September 15, 1975.

In view of the untimely filing, respondent issued a billing statement dated December 12, 1975, to appellant showing a proposed penalty of **\$4,403.00**, plus accrued interest, and advising appellant of its right to request a hearing to protest the imposition of the penalty. Appellant made such request, and pursuant to respondent's customary procedure in such circumstances, respondent then issued appellant an official notice of the deficiency proposed to be assessed and also placed the matter in protest **status**.

As is also customary in this situation, the computer was provided the information that a protest had been filed to preclude billing for the penalty in the next computer cycle. The information reads on the computer printout as "**cancel pen.**" This procedure is deemed necessary because, by protesting within 60 days from the date of notice of the proposed assessment, appellant's liability did not **become final**. (Rev. & Tax. Code, § 25665.)

Consequently, the billing for the amount of the penalty was cancelled, but because appellant owed applicable interest, an additional billing was mailed to appellant on May 7, 1976. This statement contained a computer printout of all the activity on appellant's account for the income year 1974, including the assessment of the accrued interest of \$55.01 and the cancellation of the penalty. Included in the statement was, "**a demand for payment of unpaid liability that has become final,**" which had reference to the accrued interest.

Section 25931 of the Revenue and Taxation Code provides for a graduated penalty for late filing. 'The penalty, not to exceed 25 percent, is mandatory, unless

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the failure to file is due to reasonable cause and not willful neglect. Substantially similar language is found in section 6651(a) of the Internal Revenue Code **of** 1954. During the time in question, section 25402 precluded granting an extension of time for filing unless the request was made on or before the due date for filing the return. 1/

Appellant contends that the untimely filing of its California franchise tax return was due to reasonable cause and not willful neglect. In support of its position appellant has explained that it was merely through clerical oversight that the written request for an extension of time was not mailed timely. Appellant maintains that the State of California did not incur any substantial loss because an amount in excess of the total tax was received by the state by April 3, 1975, when the extension request was made.

Appellant also urges that the written statement it received on May 7, 1976, clearly indicated that the **\$4,403.00** penalty was cancelled and, consequently, respondent should be estopped from reinstating the penalty.

It is well **established** that appellant has the burden of proving that the **late** filing of its tax return was due to reasonable cause and not due to willful neglect. (C. Fink Fischer, 50 T.C. 164 (1968); Appeal of Samuel R. and Eleanor H. Walker, Cal. St. Bd. of Equal., March 27, 1973.) Both conditions must exist. (Rogers Hornsby, 26 B.T.A. 591 (1932); Charles E. Pearsall & Son, 29 B.T.A. 747 (1934).) On the record before us, there appears to have been no willful neglect on the part of appellant. To establish the existence of reasonable cause, however, the taxpayer must show that the failure to file occurred despite the exercise of ordinary business care and prudence. (Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den., 350 U.S. 967 [100 L. Ed. 8391 (1956)]; Appeal of Loew's San Francisco Hotel Corp., Cal. St. Bd. of Equal., Sept. 17, 1973.)

The duty of preparing and filing a corporate return primarily rests upon the responsible executive officers of the corporation and such responsibility is

1/ This condition is no longer imposed. (See present Rev. & Tax. Code, § 25402, subd. (a).)

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not to be taken lightly. As a general rule, there is an absence of reasonable cause when clerical help or other corporate employees fail to file a timely return. (See Pioneer Automobile Service Co., 36 B.T.A. 213 (1937).) That is not to say, however, that under the facts of a particular case there cannot be a showing that the conduct of the responsible corporate officer or the individual taxpayer amounted to the exercise of reasonable care sufficient to attribute untimely filing to a reasonable cause. (See, e.g., Hammonton Investment and Mortgage Co., 159,212 P-H Memo. T.C. (1959), affd. on other grounds, 284 F.2d 950 (3d Cir. 1960); United Aniline Co., 1162,060 P-H Memo. T.C. (1962), affd. on other grounds, 316 F.2d 701 (1st Cir. 1963).

In the instant appeal, however, the appellant has offered no such evidence. Therefore, we must conclude that reasonable cause was absent.

Moreover, we cannot conclude that the issuance of the billing statement containing the computer printout of activity on appellant's account should estop respondent from assessing the penalty. The cancellation of the penalty recorded in respondent's computer system is a routine procedure instituted when a taxpayer protests the imposition of the penalty. In such cases, the penalty is removed from the billing cycle, and a formal notice of proposed assessment is issued. This is done in order that the taxpayer might avail itself of the protest procedure before any ultimate payment. In the matter before us, the second billing statement was generated because appellant owed interest. The statement showed all of the activity in appellant's account relating to the year in question, including a notation of the cancellation of the penalty, which was cancelled because it was not a current liability, having been duly protested. The statement was not intended in any way to indicate formal action on the merits of appellant's protest. We conclude that appellant could not reasonably rely on the statement as representing that the penalty would be permanently cancelled.

Furthermore, only in a very unusual situation will an estoppel be raised against the government in a tax case. The facts must be clear and the injustice great. (La Societe Francaise v. Calif. Emp. Com., 56 Cal. App. 2d 534 [133 P.2d 47] (1943); Market St. Ry. Co. v. State Board of Equal., 137 Cal. App. 2d 87 [290 P.2d 20] (1955); Appeal of Esther Zoller, Cal. St. Bd of Equal., Dec. 13, 1960; Appeal of Harlan R. and Esther A.

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Kessel, Cal. St. Bd. of Equal., March **27,1973.**) Here, **the facts** resulting in the penalty occurred prior to receipt of the alleged written misinformation. Therefore, there was no detrimental reliance and, consequently, no basis for estoppel exists.

Appellant's argument that respondent did not incur any substantial loss is irrelevant. Appellant simply failed to file a timely request for an extension within the express statutory limit that existed at the time in question.

For the reasons set out above, we conclude that respondent's action in this matter must be sustained.

Q R C E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of the Revenue and Taxation **Code**, that the action of the Franchise Tax Board on the protest of Telonic Altair, Inc., against the proposed assessment of a penalty for the late filing of a franchise tax return in the amount of **\$4,403.00** for the income year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this **4th** day
of **May**, by the State Board of Equalization.

Joseph J. Kelly, Chairman
Paul H. Kelly, Member
Drs. Sanley, Member
William H. Bennett, Member
_____, Member